Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Enforcement of Other Nations' Prohibitions Against the Uncompleted Call Signaling Configuration of International Call-back Service	)	**IB Docket No. 02-18**
Petition for Rulemaking of the Telecommunications Resellers Association To Eliminate Comity-Based Enforcement of Other Nations' Prohibitions Against the Uncompleted Call Signaling Configuration of International Call-back Service	)	**RM-9249**

COMMENTS OF THE
ASSOCIATION OF COMMUNICATIONS ENTERPRISES

The Association of Communications Enterprises ("ASCENT"),[1] through undersigned counsel, and pursuant to § 1.415 of the Commission's Rules,[2] hereby comments in support of the Commission's tentative conclusion, set forth in the *Notice of Proposed Rulemaking* in the above-captioned proceeding (released February 13, 2002), "[g]iven developments in the international telecommunications market and consistent with [the Commission's] procompetitive policies . . . to remove the policy that allows a foreign government or entity to make use of the enforcement

[1] ASCENT, formerly the Telecommunications Resellers Association, is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carriers a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

[2] 47 C.F.R. § 1.415.

mechanisms of the Commission to prohibit U.S. carriers from offering [uncompleted call signaling] abroad."[3] In its *Call-Back Reconsideration Order*,[4] issued seven years ago, the Commission made clear that the United States had no obligation under International Telecommunications Regulations to "enforce any provision of the domestic law or regulation of any other Member."[5] As the Commission explained, "foreign governments . . . [can]not, simply by enacting domestic legal, regulatory, or procedural measures, require the United States to implement such measures as a matter of international law."[6]

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[3] Enforcement of Other Nations' Prohibitions Against the Uncompleted Call Signaling Configuration of International Call-back Service, Petition for Rulemaking of the Telecommunications Resellers Association to Eliminate Comity-Based Enforcement of Other Nations' Prohibitions Againt the Uncompleted Call Signaling Configuration of International Call-back Service, *Notice of Proposed Rulemaking*, IB Docket No. 02-18, RM-9249 (released February 13, 2002) ("*NPRM*"), ¶ 22.

[4] Via USA, Ltd., 10 FCC Rcd. 9540 (1995) ("*Call-Back Reconsideration Order*"), ¶ 52.

[5] Id., ¶ 47.

[6] Id.

Despite the Commission's long-held belief that innovative international service alternatives such as international call-back service further the public interest by fostering competition and driving down rates in the international market, it reluctantly agreed, at the request of a handful of foreign governments and based on considerations of international comity, to enforce the laws of other nations prohibiting the provision of international call-back service using uncompleted call signaling.[7] Aware, however, that its enforcement of foreign laws barring international call-back service was antithetical to its policy of fostering global telecommunications competition, the Commission sharply limited such enforcement activities to certain well-defined "exceptional circumstances." Such "exceptional circumstances" require that (i) the foreign government has "expressly found international call-back using uncompleted call signaling to be unlawful," and documented such legal restrictions; (ii) the foreign government demonstrates that a U.S. carrier has violated a domestic law or regulation prohibiting international call-back service and provided persuasive evidence of such violation; and (iii) the foreign government has diligently attempted, and despite those diligent efforts has failed, to enforce its prohibitions against use of international call-back service, and has documented its enforcement activities.[8]

Even this limited accommodation, however, does violence to the Commission's pro-competitive international policies. Certainly, principles of international comity do not require U.S. courts and agencies to recognize foreign laws which are in direct conflict with U.S. policy. Indeed, even the resolution on alternate calling services passed at the 1994 International Telecommunications Union ("ITU") Plenipotentiary Conference in Kyoto recognized that comity requires only that "member states having jurisdiction over a call-back provider whose operations

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[7] Id., ¶¶ 47, 50.

[8] *Call-Back Reconsideration Order*, ¶ 52.

infringe another member state's laws inquire into the matter and take such actions *as may be appropriate within the constraints of its national law*."[9]

[9] Id., ¶ 48 (emphasis added).

As the *NPRM* notes, while "36 countries have submitted information about the legality of call-back within their territories" since the inception of the Commission's policy," in that entire time, *only two countries* -- Saudi Arabia and the Philippines -- "have satisfied the requirements necessary for the Commission to assist in the enforcement of foreign laws against call-back."[10] Thus, it is clear that very little practical purpose is served by the policy, virtually no foreign government having demonstrated that it has exercised sufficient enforcement efforts within its own borders to entitle it to make use of the Commission's enforcement mechanisms. The doctrine of comity, which the Commission recognizes as purely "a discretionary means for U.S. Courts and agencies to take account of foreign sovereign act,"[11] has little justifiable application in the absence of efforts by sovereign states to enforce their own laws and policies.[12]

In his seminal work on conflicts of laws, Justice Joseph Story noted an important limitation on the doctrine of comity, arguing that it "seems irresistibly to flow from the right and duty of every nation to protect its own subjects against injuries resulting from the unjust and prejudicial influence of foreign laws; and to refuse its aid to carry into effect any foreign laws, which are repugnant to its own interests and polity."[13] Indeed, Justice Story reasoned, if a country were compelled to enforce even those foreign laws that conflict with its own policies, the rule "would at

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[10] *NPRM*, ¶ 6.

[11] Id., ¶ 10.

[12] *See* Laker Airways, Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 937 (D.C. Cir. 1984) ("No nation is under an unremitting obligation to enforce foreign interests, which are fundamentally prejudicial to those of the domestic forum. Thus, from the earliest times, authorities have recognized that the obligation of comity expires when the strong public policies of the forum are vitiated by the foreign act."); Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 75 (3d Cir. 1994) (comity "must yield to domestic policy" and "cannot compel a domestic court to uphold foreign interests at the expense of the public policies of the forum state.").

[13] J. Story, Commentaries on the Conflict of Laws, 30, 32-33 (1934) (Arno Press ed. 1972)

once annihilate the sovereignty and equality of the nations . . . or compel them to desert their own proper interest and duty in favor of strangers, who were regardless of both."

In this, its most recent consideration of the call-back policy, the Commission appropriately observes that, "the balancing of interests involved in the Commission's 1995 decision to adopt the comity-based call-back policy has shifted,"[14] although the ultimate policy determination, "that the public interest, convenience and necessity would be served by authorizing the U.S. carriers to provide such service, that 'could place significant downward pressure on foreign collection rates, to the ultimate benefit of U.S. ratepayers and industry,'"[15] remains unchanged.

Over the last decade, in an effort to achieve internationally the lower costs and greater innovation that competition has brought to the U.S. domestic market, the Commission has encouraged foreign governments to open their markets to competition and to adopt pro-competitive, transparent regulatory policies.[16] For example, "in November 1995, when only a handful of the world's telecommunications markets were open to competition by U.S. carriers, the Commission issued the *Foreign Carrier Entry Order* to encourage foreign governments to open their markets to competition."[17] And the Commission's 1996 *Flexibility Order*, which "opened the way for carriers to engage in alternative arrangements outside of traditional settlement practices to encourage the more economically efficient routing of traffic," and the Commission's *Benchmarks Order*, which "requires U.S. carriers to reduce the settlement rates they pay to foreign carriers and also imposes

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14 *NPRM*, ¶ 1.

15 Id., ¶ 3.

16 *See, e.g.,* Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Report and Order*, IB Docket No. 97-142, FCC 97-398, (rel. Nov. 26, 1997), ¶¶ 1-12.

17 Id., *citing* Market Entry and Regulation of Foreign-Affiliated Entities, *Report and Order*, 11 FCC Rcd. 3873 (1995).

certain conditions on participation in the U.S. market that are aimed at reducing the incentives and ability of a foreign carrier to act anticompetitively to the detriment of U.S. consumers," have "pave[d] the way for a new approach to foreign participation in the U.S. telecommunications market."[18]

[18] Id., ¶ 6, *citing* Regulation of International Accounting Rates, Phase II, *Fourth Report and Order*, 11 FCC Rcd. 20063 (1996) and International Settlement Rates, *Report and Order*, 12 FCC Rcd. 19806 (1997).

In February 1997 – two years *after* adoption of the present callback policy by the Commission – these market-opening efforts came to fruition as 69 nations took the historic step of concluding the WTO Basic Telecom Agreement, in which the United States and most of its major trading partners committed to open their markets for basic telecommunications services to competitive entry. As described by the Commission, "[t]he WTO Basic Telecom Agreement seeks to replace the traditional regulatory regime of monopoly telephone service providers with procompetitive and deregulatory policies."[19] Indeed, the Commission anticipated that "the market-opening commitments of . . . [its] trading partners . . . [will] bring procompetitive developments throughout the world."[20]

[19] Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Report and Order and Order on Reconsideration*, 12 FCC Rcd. 23891 (1997).

[20] Id.

Finding "that the binding commitments made by 69 WTO Members to open their telecommunications markets to competition, along with the increased pressure to lower settlement rates and the emergence of new technologies and routing configurations, will bring dramatic changes to the competitive landscape for global telecommunications services," the Commission "adopt[ed] rules . . . opening the U.S. market to competition from foreign companies."[21] Specifically, the Commission established a presumption in favor of authorizing foreign carriers from WTO Member countries to enter and compete in the U.S. telecommunications market, regardless of whether a particular WTO Member country has made satisfactory market opening commitments *or any such commitments at all.*[22] This open entry standard for carriers from WTO Member countries replaced the effective competitive opportunities ("ECO") anaylsis which required the opening of foreign telecommunications markets to U.S. carriers as a precondition to entry by foreign carriers into the U.S. telecommunications market.

The Commission justified its unilateral opening of U.S. markets on the ground that "increased competition in global markets will increase pressure on all WTO Members to liberalize their telecommunications market, including those that have made no commitments or limited commitments."[23] Unfortunately, not all countries have taken such liberalizing steps. In such countrie,s uncompleted call signaling retains its greatest benefit to consumers. As the Honorable Thomas J. Bliley, Jr., then Chairman of the Committee on Commerce, U.S. House of Representatives has told the Commission,

> sixty-nine national accounting for over 90% of worldwide telecommunications

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21 Id., ¶¶ 2, 29.

22 Id., ¶¶ 37-38.

23 Id., ¶ 12.

revenues concluded the WTO Agreement on Basic Telecommunications, radically altering the international telecommunications marketplace by replacing the traditional monopoly telephone model with an open, pro-competitive global regulatory regime. Although most of the United States' major trading partners joined in this WTO Agreement, a few countries remain out of step with the rest of the world. These countries either did not participate in the market opening process or took specific reservations against call-back services.

Under the circumstances, allowing foreign interests to use comity as a weapon for the enforcement of anticompetitive foreign restrictions is to reward those countries that resisted the procompetitive tide in the WTO process. By continuing to offer a convenient forum for the enforcement of anticompetitive foreign laws, the Commission could become the unintended accomplice of those who seek to thwart the Commission's own market opening agenda."[24]

[24] Letter from the Honorable Thomas J. Bliley, Jr., Chairman, Committee on Commerce, U.S. House of Representatives, One Hundred Fifth Congress, to William E. Kennard, Chairman, Federal Communications Commission (March 27, 1998).

The Commission's tentative conclusion to "remove the policy that allows a foreign government or entity to make use of the enforcement mechanisms of the Commission to prohibit U.S. carriers from offering [uncompleted call signaling] abroad"[25] both recognizes and acts to mitigate the concerns voiced by Chairman Bliley. Furthermore, the Commission's tentative conclusion is fully in accord of its long-standing policy "support[ing] call-back as an important pro-competitive force in the international services market."[26] Having made the policy judgment to fully and immediately honor its WTO commitments, the Commission should not assist other countries which have not done so in enforcing market entry barriers, particularly prohibitions against the provision of the one service that can be provided on a competitive basis despite the efforts of foreign monopoly providers to insulate their home markets from competition.

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[25] *NPRM*, ¶ 22.

[26] Letter from Honorable William E. Kennard, Chairman, Federal Communications Commission, to the Honorable Thomas J. Bliley, Jr., Chairman, Committee on Commerce, U.S. House of Representatives, One Hundred Fifth Congress (May 21, 1998).

Indeed, the Commission's comity-based enforcement policy may actually hinder pro-competitive, consumer-oriented initiatives within countries which currently seek to thwart competition by prohibiting international call-back service. Just as foreign countries by limiting competitive entry deny "U.S. consumers of international services . . . the maximum benefits of reduced rates, increased quality, and innovation,"[27] so too do they deprive their own citizens of these same benefits. The greater the visibility of these adverse financial and service impacts, the more likely it is that the restrictions which occasion them will be subject to legal and/or political challenge by these same citizens. In allowing foreign governments and their monopoly providers of telecommunications services to utilize its enforcement mechanisms to perpetuate bans on the provision of international call-back service, the Commission is providing a forum free of the legal and/or political pressures that might otherwise be brought to bear at home. Not only should "foreign governments which have decided to outlaw uncompleted call signaling bear the principal responsibility for enforcing their domestic laws,"[28] they should also have to deal with the legal and political fallout from these anti-competitive restrictions.

As the Commission notes, "[t]he global commitment to competitive policy . . . has increased dramatically since the adoption of the Commission's policy on call-back. . . . We believe that the Commission should have a clear, consistent policy in favor of competition on U.S. international routes and foreign markets." ASCENT agrees with the Commission's assessment that "[t]his pro-competitive policy should extend to all forms of call-back. The current comity-based

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[27] Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Order*, 12 FCC Rcd. 7847, ¶ 27.

[28] *Call-Back Reconsideration Order*, ¶ 50.

policy may be construed as diminishing the Commission's support for competitive forces."[29] Thus, the response to the Commission's question, "whether, given the 1996 Act's commitment to competition and the Commission's recent policies to promote competitive markets abroad, elimination of the existing policy . . . is an appropriate response within the constraints of U.S. law and therefore is consistent with the ITU declaration"[30] is a resounding "yes".

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29 Id., ¶ 15.

30 Id., ¶ 18.

Years of experience support the Commission's observations that "[t]he availability of call-back service may be particularly beneficial to residents of developing countries" and "Call-back service gives consumers in developing countries access to international calling prices that are generally much lower than the prices offered by carriers in their countries . . . mak[ing] international calling more affordable in developing markets."[31] In light of these benefits to consumers, as well as the Commission's commitment to "continue to work in various fora to promote network expansion and universal access in developing markets", the Commission's tentative conclusion to eliminate its policy allowing foreign governments or entities to utilize Commission enforcement mechanisms to enforce restrictions on uncompleted call signaling is the right one. Indeed, when it is remembered that since the inception of the Commission's present policy only *two entities* have satisfied the Commission's criteria for utilizing FCC enforcement procedures to enforce foreign restrictions on call-back service, it appears that the existing call-back policy is not one which has merely outlived its useful, it has been a policy of questionable useful *ab initio*.

In keeping with the Commission's overall policy commitments to fostering not only a national but also an international pro-competitive telecommunications environment, the call-back policy should now be retired. This would in no way limit the ability of foreign governments to enforce their internal laws which are in conflict with a policy which the Commission has steadfastly held to be beneficial to the public interest. Rather, retiring the call-back policy would merely

[31] Id., ¶ 21.

remove the possibility that the Commission could be placed in the unenviable – and inappropriate – position of having to enforce a foreign law antithetical to its own policy determination.

Respectfully submitted,

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

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